UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELLA CHIMINYA TACHIONA, et al.,	:	
Plaintiffs,	:	
v.	:	00 Civ. 6666 (VM)
ROBERT GABRIEL MUGABE, STAN MUDENGE, JONATHAN MOYO, et al.,	:	
Defendants.	:	

GOVERNMENT'S MEMORANDUM OF LAW IN REPLY TO
PLAINTIFFS' ANSWERING BRIEF CONCERNING DEFENDANTS' IMMUNITY

The United States of America, by its attorney, Mary Jo White, United States Attorney for the Southern District of New York, respectfully submits this Memorandum of Law in reply to the Plaintiffs' response to the Suggestion of Immunity previously submitted by the United States as to defendants Robert Gabriel Mugabe, the President and sitting head-of-state of Zimbabwe, and Stan Mudenge, the Minister of Foreign Affairs of Zimbabwe.

PRELIMINARY STATEMENT

Executive Branch suggestions of immunity for foreign heads-of-state and foreign ministers are binding on the judiciary, and have been recognized as such for more than a century. See Point I.A., infra. Courts and commentators both internationally and within the United States recognize this doctrine as an essential safeguard of bilateral relations among states, and of the Executive Branch's role in the conduct of foreign affairs. Id. United States courts uniformly have deferred to suggestions of immunity by the Executive Branch as to heads-of-state or foreign

ministers, both before and after the 1976 passage of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, et seq. Id. This practice is of major importance to the United States' conduct of foreign affairs, and the Court should not accept Plaintiffs' invitation to depart from it.

Plaintiffs' argument that the Court should assert jurisdiction here is based on incorrect analysis of the FSIA and on inapposite authority. See Point I.B., infra. Contrary to Plaintiffs' argument, the FSIA was drafted and passed in response to an expansion in commercial activities by foreign states and government-owned entities. The FSIA therefore altered the procedures for determining the immunity of foreign states and government-owned entities. Both the FSIA's plain language and its legislative history make clear that it governs suits against foreign governments and government entities, and that in adopting the FSIA Congress did not change longstanding practices governing the immunity of heads-of-state. Id.

The threat posed by Plaintiffs' contentions to the conduct of foreign affairs is heightened further by the fact that Plaintiffs served process on defendants Mugabe and Mudenge while they were in New York as Zimbabwean representatives to the United Nations, which may arouse diplomatic concerns not only from Zimbabwe, but from literally every nation that sends delegates to U.N. conferences in the United States. The fact that defendants Mugabe and Mudenge were in the United States in their capacities as representatives to the U.N. when they were served deprives this Court of jurisdiction for the additional, independent reason that Mugabe and Mudenge enjoyed "personal inviolability" and diplomatic immunity from suit at all times during their visit to the United States. See Point II, infra.

Finally, the inviolability of defendants Mugabe and Mudenge renders them

immune not only from suit, but from the very service of process. See Point III, infra. Accordingly, the service on them should be quashed or ruled a nullity. Id.

ARGUMENT

POINT I

DEFENDANTS MUGABE AND MUDENGE ENJOY HEAD-OF-STATE IMMUNITY FROM THIS SUIT

A. This Court is Bound by the Executive Branch's Determination of Mugabe's and Mudenge's Head-of-State Immunity

1. The Executive Branch's Determination Binds the Court and Deprives It of Personal Jursidiction Over Defendants Mugabe and Mudenge

The Executive Branch is empowered to make conclusive determinations of head-of-state immunity. The Supreme Court has repeatedly instructed courts that it is their "duty" to defer to Executive Branch suggestions of immunity, and that such suggestions are conclusive on the courts. See Ex Parte Peru, 318 U.S. 578, 589 (1943) (suggestion of immunity of vessel owned by foreign government "must be accepted by the courts as a conclusive determination by the political arm of the Government"); see also United States v. Lee, 106 U.S. 196, 209 (1882) ("the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction"); Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945).

Courts' deference to the Executive Branch as to head-of-state immunity serves that doctrine's underlying purpose, which "is founded on the need for mutual respect and comity among foreign states." See In re Doe, 860 F.2d 40, 45 (2d Cir. 1988) (citing In re Grand Jury Proceedings, Doe No. 700, 817 F.2d 1108, 1111 (4th Cir.), cert. denied, 484 U.S. 890 (1987)).

The deference due Executive Branch suggestions of immunity also rests on considerations arising out of the conduct of this country's foreign relations. Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974); see also Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) ("Both comity and the Executive's plenary role in fashioning foreign policy suggest that the State Department needs to retain decisive control of grants of head-of-state immunity"). As the Fifth Circuit has observed, "Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." Spacil, 489 F.2d at 619 (citing United States v. Lee, 106 U.S. at 209; Ex Parte Peru, 318 U.S. at 588). Further, in contrast to the institutional resources of the Executive Branch and the extensive experience of the Executive in administering the country's foreign affairs, the judiciary is "ill-equipped to second-guess" Department of State determinations concerning those interests. Spacil, 489 F.2d at 619; see also In re Doe, 860 F.2d at 45 (in comparison with judiciary, Executive Branch has constitutional authority and "greater experience and expertise" concerning foreign affairs).

Consistent with these concerns and the Supreme Court's repeated command, there is a uniform body of decisions recognizing the immunity of heads-of-state as to whom the Executive Branch files a suggestion of immunity. See, e.g., First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (suggestion by executive branch of the United Arab Emirates' Sheikh Zayed's immunity determined conclusive and required dismissal of claims alleging fraud, conspiracy, and breach of fiduciary duty); Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (suggestion by Executive Branch of King Fahd's immunity as head of state of Saudi Arabia held to require dismissal of

complaint against King Fahd for false imprisonment and abuse), aff'd, 79 F.3d 1145 (5th Cir. 1996); Lafontant v. Aristide, 844 F. Supp. 128, 132-33 (E.D.N.Y. 1994) (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging President Aristide ordered murder of plaintiff's husband); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (suggestion by Executive Branch of Prime Minister Thatcher's immunity conclusive in dismissing suit that alleged British complicity in U.S. air strikes against Libya), aff'd in part and rev'd in part on other grounds, 886 F.2d 438, 441 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990); Gerritsen v. de la Madrid, No. CV 85-5020-PAR, slip op. at 7-9 (C.D. Cal. Feb. 5, 1996) (in suit against Mexican President de la Madrid and others for conspiracy to deprive plaintiff of constitutional rights, action against President de la Madrid dismissed pursuant to suggestion of immunity) (Ex. 3 to Suggestion of Immunity), rev'd as to other defendants on other grounds, 819 F.2d 1119 (9th Cir. 1987); Estate of Domingo v. Marcos, No. C82-1055V, unpublished Order at 2-4 (W.D. Wash. Dec. 23, 1982) (action alleging political conspiracy by, among others, then-President Ferdinand Marcos and then-First Lady Imelda Marcos of the Republic of the Philippines dismissed against them pursuant to suggestion of immunity) (Ex. 4 to Suggestion of Immunity); Psinakis v. Marcos, No. C-75-1725-RHS (N.D. Cal. 1975), result reported in Sovereign Immunity, 1975 Digest of U.S. Practice in Int'l Law § 7, at 344-45 (Ex. 5 to Suggestion of Immunity) (libel action against then President Marcos dismissed pursuant to suggestion of immunity); Anonymous v. Anonymous, 181 A.D.2d 629, 581 N.Y.S.2d 776, 777 (1st Dep't 1992) (divorce suit against head of state dismissed pursuant to suggestion of immunity); Guardian F. v. Archdiocese of San Antonio, Cause No. 93-CI-11345 (Tex. Dist. Ct. 1994) (Ex. 6 to Suggestion of Immunity) (suggestion of immunity required

dismissal of suit against Pope John Paul II); see also 1 Hyde, International Law, Chiefly as Interpreted and Applied by the United States 817 (2d ed. 1945)[1] ("[N]ecessity demands that the interests of the foreign State should not be injured or embarrassed by subjecting to local process such a national representative as a president or a king. As a matter of practice, the head of a foreign State, who, as such, enters the territory of any other, enjoys . . . exemption from local jurisdiction"). While Plaintiffs suggest much of this case law is somehow less persuasive because it consists of "trial court decisions," see Pl. Mem. 17, the doctrine nevertheless is firmly established and has been recognized by every court to confront it.[2]

The Executive Branch's determination here is equally binding as to Defendant Mudenge, the Foreign Minister of Zimbabwe, as it is concerning President Mugabe. As a threshold matter, and contrary to Plaintiffs' suggestion that Zimbabwe's Foreign Minister is equivalent to other foreign government officials who have been held liable in civil suits here, see Pl. Mem. 25, foreign ministers have long been recognized to be entitled to treatment equivalent to a foreign head-of-state. See The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116,

---

[1] Copies of all foreign authority and treatise excerpts cited herein are reproduced in the accompanying Appendix of Authorities ("App. Auth.").

[2] To the best knowledge of the United States, only one court, in readily distinguishable circumstances, has ever found a suggestion of immunity filed by the Executive Branch not to be binding on the court. See Republic of the Philippines v. Marcos, 665 F. Supp. 793 (N.D. Cal. 1987). In Marcos, the Executive Branch suggested immunity for Philippine Solicitor General Sedfrey Ordonez on grounds that he was a foreign government representative performing official functions and thus entitled to immunity. The Court construed the suggestion of immunity as a suggestion of both head-of-state immunity and of diplomatic status, and quashed service of a subpoena solely on the latter ground. 665 F. Supp. at 797-800. The United States had no occasion to appeal the Marcos court's basis for finding immunity because the court took the exact action urged by the United States, albeit on different grounds. Moreover, as the Marcos court stressed, that case did not involve either an actual head-of-state such as Mugabe, nor a foreign minister entitled to equivalent treatment, as is Mudenge. See 665 F. Supp. at 797.

138 (1812) (Marshall, C.J.) (under customary international law, "the immunity which all civilized nations allow to foreign ministers" is coextensive with the immunity of the sovereign); Kim v. Kim Yong Shik, Civ. No. 12565 (Cir. Ct., 1st Cir., Hawaii 1963) (Ex. 2 to Suggestion of Immunity) (recognizing immunity of foreign minister).

Moreover, the Executive Branch's conclusive authority as to head-of-state immunity extends to persons beyond the formal head-of-state. Upon the filing of a suggestion of immunity, head-of-state immunity has been applied to a foreign minister, see Kim; to spouses of heads-of-state, see Estate of Domingo, supra, slip op. at 2-4 (Mrs. Marcos of the Philippines), Kline v. Kaneko, 141 Misc. 2d 787, at 787, 535 N.Y.S.2d 303, at 305 (Sup. Ct. N.Y. Co. 1988) (Mrs. de la Madrid of Mexico), aff'd w/o op., 154 A.D.2d 959, 546 N.Y.S.2d 506 (1st Dep't 1989), to the head of government, see Saltany, 702 F. Supp. at 320 (Prime Minister Thatcher of the UK), and to the royal heir, see Kilroy v. Windsor (Charles, Prince of Wales), No. C 78-291 (slip op. N.D. Ohio Dec. 7, 1978) (see App. Auth.).

Acceptance of the Executive Branch's Suggestion of Immunity in this case will also comport with principles of international law. International legal authorities recognize that a head of one state is immune from the jurisdiction of another state in circumstances such as the visit in this case. See Lord Gore-Bush, ed., Satow's Guide to Diplomatic Practice § 2.1 (5th ed. 1979) ("Satow's Dipl. Practice") (see App. Auth.) ("head of state . . . entitled to wide privileges and . . . immunity"); Hall, International Law 175 (4th ed. 1895) (see App. Auth.) ("A sovereign, while within foreign territory, possesses immunity"); Mighell v. Sultan of Johore, 1 Q.B. 149, 153 (Q.B. (Eng.) 1894) (see App. Auth.) ("[T]here is no precedent for saying that an independent sovereign ruler can be sued in our Courts.").

In cases where head-of-state immunity is recognized and allowed by the Executive Branch, the action must be dismissed because the court lacks personal jurisdiction over the defendant -- regardless of the types of claims at issue. See Aristide, 844 F. Supp. at 131 ("A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts"); Doe v. Karadzic, 866 F. Supp. 734, 738 (S.D.N.Y. 1994) ("Were the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction"), rev'd on other grounds, 70 F.3d 232 (2d Cir. 1995); see also In re Doe, 860 F.2d at 44 ("[t]he general rule of the head-of-state immunity doctrine is that such a person is immune from the jurisdiction of foreign courts").

Plaintiffs have not identified a single case in which a court rejected an Executive Branch suggestion of the immunity of a head-of-state or foreign minister, and they appear not to dispute that the Executive Branch historically has been vested with authority over head-of-state immunity. Rather, they contend primarily that the 1976 adoption of the FSIA transferred responsibility for all foreign immunity decisions to the courts, and marked a change from "absolute" to "restrictive" immunity for heads-of-state. See Pl. Mem. 11-20. Plaintiffs' contention is incorrect, as demonstrated in the following section.

B. The FSIA Alters Neither the Substance Nor the Executive Branch's Authority as to Head-of-State Immunity

1. The FSIA Governs the Immunity of Foreign States and Leaves the Immunity of Heads-of-State Undisturbed

Particularly given the body of international and domestic law precluding one nation's courts from exercising jurisdiction over another nation's head-of-state, see supra Point I.A., the FSIA's text cannot fairly be read to revise this long-established consensus by permitting

courts to exercise jurisdiction based on factors entirely distinct from those governing head-of-state immunity. Rather, both its text and its legislative history demonstrate an intent not to disturb established practices concerning heads-of-state.

In the FSIA, Congress "f[ound] that the determination by United States courts of the claims of foreign states to immunity [from jurisdiction] would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602 (emphasis added). The same provision further observed that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States. . . in conformity with the principles set forth in this chapter." Id. (emphasis added). Thus, the Congressional declaration of the FSIA's purpose indicates an intent to subject foreign states – not heads of state – to judicial weighing of such states' immunity or lack thereof, because of a particular Congressional concern with the determination of immunities as to commercial activities by foreign states. These reasons had nothing to do with the treatment of heads-of-state; rather, the main purpose of the FSIA was to respond to an increase in the conduct of commercial activity by foreign states or state-affiliated entities, which strained the capacity of the Executive Branch to make case-by-case immunity determinations in disputes involving such entities, and which deprived parties who dealt with foreign state-affiliated commercial entities of a predictable judicial avenue for the resolution of disputes. See Aristide, 844 F. Supp. at 137 (FSIA was "crafted primarily to allow state-owned companies, which had proliferated . . . , to be sued in United States courts in connection with their commercial activities"; FSIA "took these cases out of the political arena . . . while leaving

traditional head-of-state and diplomatic immunities untouched"); see also United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) ("Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases . . . only pursuant to the principles and procedures outlined in The Schooner Exchange and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim"), cert. denied, 523 U.S. 1060 (1998).

Indeed, even the Second Circuit's decision in In re Doe, supra, which Plaintiffs emphasize for its characterization of head-of-state immunity as "amorphous" in scope, 860 F.2d at 44, in fact recognizes that the FSIA "makes no mention of heads-of-state." Id. at 45. Importantly, the Second Circuit in Doe recognized that "the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state," and that because the Executive Branch has constitutional authority over foreign affairs as well as "greater experience and expertise in this area," it follows that "the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision." Id. The Second Circuit ultimately decided the immunity issue presented in Doe, but only because "[w]hen lacking guidance from the executive branch, as here, a court is left to decide for itself whether a head-of-state is or is not entitled to immunity." Id.

This understanding is consistent with the FSIA's definitions section, which defines a "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state," and which defines an "agency or instrumentality of a foreign state" as a "separate legal person, corporate or otherwise," which "is an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a foreign state. . . ." 28

U.S.C. § 1603. The FSIA then provided that a foreign state, as defined in section 1603, was "immune" from the jurisdiction of United States courts except as provided in sections 1605-1607 of the FSIA, 28 U.S.C. § 1604, which in turn exempted (and thus subjected to courts' jurisdiction) a variety of claims against foreign states as defined in the statute. The FSIA thus governs the immunity of "corporate and government entities – legal yet nonnatural 'persons.' Nowhere does the FSIA discuss the liability or role of natural persons, whether governmental officials or private citizens." First American Corp., 948 F. Supp. at 1120 (quoting Herbage v. Meese, 747 F. Supp. 60, 66 (D.D.C. 1990), aff'd, 946 F.2d 1564 (D.C. Cir. 1991)).

The FSIA's legislative history likewise contains no suggestion that Congress intended to depart from established doctrines and procedures governing head-of-state immunity, and, indeed, indicates an intent not to do so. In explaining Congress' intention to place certain questions of sovereign immunity in the hands of the judiciary, the principal Congressional report states that Congress intended to cause U.S. practice to "conform to the practice in virtually every other country." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., 2 (1976), reported at 1976 WL 14078 (Leg. Hist.). Certainly, were the United States to apply the FSIA to permit suits against heads-of-state, our practice would sharply diverge from that of other nations regarding head-of-state immunity. See supra Point I.A.1. This is strong indication Congress did not have head-of-state immunity in mind when enacting the FSIA. Moreover, the same report states that the FSIA "deals only with the immunity of foreign states and not its diplomatic or consular representatives," and therefore "would not govern suits against diplomatic or consular representatives but only suits against the foreign state." Id. at 21 (reprinted at 1976 U.S.C.C.A.N. 6620). While not expressly disavowing an intent to reach heads-of-state, this

statement indicates that Congress did not intend to alter the immunity status of individual officials of foreign states, but rather intended to reach only foreign states themselves.

Legislative history from earlier in the deliberations leading to the FSIA's adoption confirms the understanding of participants in the debate that the contemplated statute would not affect head-of-state immunity. An Executive Branch witness testified as to the workings of the proposed statute to permit suits against foreign state-owned corporations engaged in commercial activities, such as West Germany's state-owned airline, Lufthansa, but emphasized, "Now we are not talking, Congressmen, in terms of permitting suit against the Chancellor of the Federal Republic . . . . That is an altogether different question." Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Session 16 (1976) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice).[3]

2. A Uniform Body of Case Law Has Rejected Plaintiffs' Contention

Plaintiffs' argument that the FSIA shifted responsibility for determining the immunity of heads-of-state is further belied by the fact that United States courts since 1976 have uniformly dismissed suits against heads-of-state where the Executive Branch has filed a suggestion of immunity. See Point I.A., supra. On at least five such occasions, courts specifically rejected the argument advanced by Plaintiffs here – that enactment of the FSIA

[3] Plaintiffs' quotation of other testimony from the same hearing to the effect that "these questions of law and fact" are best reserved for the judiciary, Pl. Mem. 11 & n.18, fails to define what the words "these questions" referred to. From the accompanying discussion excepting heads-of-state from the analysis, the reasonable inference is that the "questions" to be left to the judiciary are those involving primarily commercial activities by foreign governments and government-owned entities.

authorized courts to reject Executive Branch suggestions of head-of-state immunity and to permit a suit to proceed. See Aristide, 844 F. Supp. at 132-33 (Executive Branch's suggestion of immunity mandated dismissal of suit against Haitian President Aristide; enactment of FSIA did not alter controlling effect of suggestion of immunity); First American Corp., 948 F. Supp. at 1119 (dismissing action against Sheikh Zayed on strength of Executive Branch suggestion of immunity; "enactment of the FSIA was not intended to affect the power of the State Department, on behalf of the President as Chief Executive, to assert immunity for heads of state or for diplomatic and consular personnel") (citing Aristide); Kline, 141 Misc. 2d at 787, 535 N.Y.S.2d at 305 (enactment of FSIA did not affect binding nature of Executive Branch suggestion of immunity of head-of-state's wife); Gerritsen, slip op. at 7-9 (Ex. 3 to Suggestion of Immunity) (dismissing complaint against President of Mexico on strength of Executive Branch Suggestion of Immunity; FSIA "does not refer to individual representatives of foreign governments" and "was not intended to affect the power of the State [D]epartment to assert immunity"); Estate of Domingo, slip op. at 3-4 (Ex. 4 to Suggestion of Immunity) (rejecting plaintiffs' "principal argument in opposition to the Suggestion of Immunity" that adoption of FSIA was intended to "eliminate the Suggestion of Immunity procedure"; in fact, no evidence of such intent in legislative history, and the FSIA merely governs immunity of states, not heads-of-state). No court has held to the contrary in a case involving a head-of-state, and the only case in which a court held it was not bound by a suggestion of immunity rejected an argument that the FSIA procedures applied to the lower-ranking government official in that case. See Marcos, 665 F. Supp. at 797.

Particularly noteworthy for its thoroughness is Judge Weinstein's decision in

Aristide, which extensively evaluated the question of whether the FSIA modified the head-of-state immunity doctrine. After carefully reviewing the statute and legislative history, the court summarized its conclusions:

> The FSIA was not designed to apply to diplomatic or other consular officials. Instead, it was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities. The FSIA took these cases out of the political arena of the State Department, while leaving traditional head-of-state and diplomatic immunities untouched. Scholars have argued that the willingness of the State Department, which co-authored the FSIA, to continue issuing suggestions of immunity for heads-of-state, and the willingness of courts to defer to such suggestions evidences the FSIA's nonapplicability to heads-of-state. Both comity and the Executive's plenary role in fashioning foreign policy suggest that the State Department needs to retain decisive control of grants of head-of-state immunity, by preserving the pre-FSIA "absolute" theory of immunity. The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state.

844 F. Supp. at 137 (emphasis added). The Court should reach the same conclusion here.

This result comports not only with the FSIA's text and history, and with case law applying it, but also with the sound policy underlying both the immunity and the courts' deference to the Executive Branch in the immunity's application. In recognition of the potentially profound implications of the doctrine for the conduct of foreign policy, there is "a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974) (citing United States v. Lee, 106 U.S. at 209); see also Ex Parte Peru, 318 U.S. at 588 (same). While the Executive Branch did favor adoption of the FSIA to shift responsibility for assessing the immunity of foreign state-run entities engaged in commercial conduct, see Pl.

Mem. 11 (citing Congressional testimony), the legislative history makes clear that the Executive and Legislative branches did not intend to relinquish Executive authority over immunity of foreign heads-of-state, nor did they understand the FSIA to have that effect. See supra at 11-12. That distinction reflects a considered – and correct – judgment that the prospect of personal liability of heads-of-state remained especially diplomatically sensitive, as well as contrary to international law. By contrast, the potential liability of government-affiliated entities to civil liability for commercial acts was much less diplomatically sensitive, and was consistent with an emerging consensus in international law, such that the need for Executive control for foreign relations reasons was much less, and more than offset by the advantages afforded by judicial determination of the immunity of such entities.

3. Plaintiffs' FSIA Authority Is Inapposite

Plaintiffs' arguments that the FSIA completely superseded Executive Branch authority over all immunity questions are based either on faulty analysis of the FSIA, or on inapposite authority. First, Plaintiffs assert that the FSIA's definition of foreign states as including "legal persons" means that individuals, including heads-of-state, may constitute foreign states. See Pl. Mem. at 13, 16. This contention is contrary to the common legal understanding of the term "legal person" to denote an artificial legal construct, as opposed to a "natural person" who is an individual. See First American Corp., 948 F. Supp. at 1120 (FSIA governs immunity of "corporate and government entities – legal yet nonnatural 'persons.' Nowhere does the FSIA discuss the liability or role of natural persons") (quoting Herbage v. Meese, 747 F. Supp. 60, 66

(D.D.C. 1990), aff'd, 946 F.2d 1564 (D.C. Cir. 1991)).[4]

The Ninth Circuit decision from which Plaintiffs derive much of their argument is inapposite. See Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990). First, Chuidian did not involve the immunity of a head-of-state or foreign minister, but rather dealt with whether a subordinate Philippine official (a member of the "Presidential Commission on Good Government") was immune from suit for acts taken in his official capacity. See 912 F.2d at 1097. Second, unlike the present case, in Chuidian the United States did not file a suggestion of immunity; rather, it filed a "statement of interest" akin to an amicus brief, in which it contended that a particular analysis should be followed and the official be deemed immune. See 912 F.2d at 1099. These two distinctions are critical and dispositive, because they place Chuidian outside of the range of cases, such as this one, as to which the Executive Branch retains legally binding authority to file binding suggestions of immunity. See Point I., supra.

As to whether suit was authorized against the official by the FSIA, the Chuidian court observed that it "is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." 912 F.2d at 1101. The court held that, for this reason, "we cannot infer that Congress, in passing the [FSIA],

---

[4] Plaintiffs' construction of the FSIA also is contrary to the internationally-accepted understanding of sovereign immunity laws here and elsewhere, and, further, would cause the United States to violate recognized international law. For example, while acknowledging the existence of restrictions adopted to the immunity of foreign states, particularly for commercial activities, one leading treatise went on to observe: "But none of this large and complex body of international law has been drawn up with the position of heads of state in mind. A clear distinction is drawn in the law of many states, and implied in the law of others, between the foreign state as a legal entity and the head of such a state as an individual." Satow's Dipl. Practice § 2.1. As to heads-of-state, "a very high degree of privilege and immunity remains due." Id.

intended to allow unrestricted suits against individual foreign officials acting in their official capacities." 912 F.2d at 1102. At the same time, however, the court rejected the Government's contention that courts should defer to all Executive Branch assertions of foreign officials' common law immunity, especially because of the lack of "practical difference between a suit against a state and a suit against an individual acting in his official capacity." Id. Therefore, the court concluded that the suit against the official for his official acts "must be analyzed under the framework" of the FSIA. 912 F.2d at 1103. Applying the FSIA, the court concluded that none of the statute's exceptions applied to the official, so that his conduct was immunized. 912 F.2d at 1106.

Importantly, Chuidian did not hold that Courts may disregard suggestions of immunity submitted as to a head-of-state or foreign minister, nor did it consider the unique foreign policy and institutional competence concerns raised in such cases – the very considerations that are dispositive in this case. See Point I, supra. Rather, the court in Chuidian sought to foreclose two problems that it perceived could result from failure to apply the FSIA to claims against individuals arising from their official acts: first, the risk of allowing litigants to escape the effect of the FSIA by artfully pleading complaints against individual officials, rather than the foreign state in question, see Chuidian, 912 F.2d at 1102 ("Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly"); and second, the perceived negative effect of permitting the Executive Branch to indirectly assert its authority over all questions of foreign sovereign immunity, notwithstanding the FSIA's shift of such authority to the courts, by issuing binding suggestions of immunity as to any government official it chose, id. (noting that, if

United States retained exclusive competence over immunity of all foreign officials, result would "promote a peculiar variant of forum shopping" in which litigants who thought the Executive Branch would be receptive would sue individual foreign officers, while others would sue the foreign state itself; this result would be particularly incongruous given the lack of "practical difference" between suits against foreign states and suits against the officials for acts taken in their official capacity). These two considerations simply are not presented by cases against foreign heads-of-state and foreign ministers, as to whom an independent body of law recognizes Executive authority and a separate form of immunity. See Point I, supra.

While Plaintiffs cite what appears to be a substantial body of authority subjecting foreign officials to FSIA analysis or otherwise permitting suit against such officials, their cases all are distinguishable on a relatively few grounds. First, none of Plaintiffs' cases present the special considerations raised by claims against a sitting foreign head-of-state or foreign minister whose immunity was recognized by the Executive Branch; the cases therefore fail to shed any light on the issue in this case: whether, consistent with longstanding understanding and practice, the Executive Branch retains authority to suggest the immunity of such officials.

Moreover, Plaintiffs' position is not supported by cases applying FSIA immunity analysis to claims against individual officials arising from their official acts, because those decisions are predicated on an understanding, implicit or explicit, that such suits are the practical equivalent of claims on the state itself, as the court observed in Chuidian.[5] See, e.g., Jungquist v. Al Nahyan, 940 F. Supp. 312, 317 (D.D.C. 1996) ("[a]n 'agency or instrumentality of a foreign

[5] The United States takes no position as to whether the conduct alleged constituted official or unofficial acts.

state' includes individuals acting in their official capacities; however, an official is not entitled to immunity under the FSIA for acts which are not committed in an official capacity. Thus, with respect to an individual defendant, it must be determined whether that defendant was acting in their official capacity and thus was an 'agency or instrumentality' of a foreign state in order to be accorded immunity under the FSIA") (citing El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996); Chuidian, 912 F.2d at 1099-1103; In re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493, 496-97 (9th Cir.1992), cert. denied, 508 U.S. 972 (1993)), rev'd in part on other grounds, 115 F.3d 1020 (D.C. Cir. 1997).

Further, many of Plaintiffs' cases simply do not raise the threshold question whether courts must defer to Executive Branch suggestions of immunity under any circumstance – not merely as to a head-of-state or foreign minister – because no such suggestion was filed. These cases therefore shed no light on the dispositive effect of such suggestions when, as here, they are submitted to the court.

Finally, because the FSIA regime has not replaced Executive Branch competence to determine the immunity of heads-of-state and foreign ministers, cases holding that other types of foreign officials do not enjoy immunity for unofficial acts under the FSIA are inapposite. See, e.g., Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996) (Ghanaian official alleged to have engaged in torture in unofficial capacity not entitled to FSIA immunity); see also In re Estate of Marcos, 25 F.3d at 1472 (FSIA does not apply to an action which is against an individual official accused of engaging in unlawful activities outside the scope of authority). Unlike here, lower-ranking foreign officials as to whom the Executive Branch has not filed a suggestion of immunity often seek to assert immunity under the FSIA, and lack any other

possible source of immunity; however, as discussed above, FSIA immunity can extend to individuals only for their official acts, and only on the theory that the suit arising from their official acts is deemed the practical equivalent of a suit against the foreign sovereign itself. See Chuidian, 912 F.2d at 1106 ("if the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign"). Here, by contrast, defendants Mugabe and Mudenge enjoy head-of-state immunity for reasons entirely separate from the FSIA. See supra at 8-15.

In sum, the Executive Branch retains binding authority over questions of head-of-state immunity, which by their nature pose serious concerns in the conduct of foreign affairs. Neither the FSIA nor any other consideration alters that authority, or permits this action to proceed.

C. Plaintiffs' Other Arguments Fail

1. Whether Defendants' Conduct Was Official or Unofficial Is Immaterial for Purposes of the Immunity of a Sitting Head-of-State

Plaintiffs argue at length that the conduct at issue was unofficial, and accordingly is not protected by immunity under the FSIA. See Pl. Mem. 23-27. But, as shown above, the applicability of head-of-state immunity here does not turn on whether the conduct giving rise to the proposed suit was official or unofficial. Head-of-state immunity, when suggested by the United States, renders the head-of-state personally immune from the jurisdiction of United States courts regardless of the acts giving rise to the lawsuit. This immunity exists independent of any immunity that may or may not be available under the FSIA, see supra Points B.1. and B.2., and renders irrelevant any cases holding that FSIA immunity is unavailable for officials whose unofficial acts give rise to lawsuits. See supra at 19.

2. The Torture Victims Protection Act Does Not Trump Defendants' Immunities

One specific application of Plaintiffs' contention that the inapplicability of FSIA immunity permits this suit is their assertion of claims under the Torture Victims Protection Act ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (28 U.S.C. § 1350 note), and the more-general Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. The TVPA subjects to suit an individual who, under color of law of a foreign nation, subjects an individual to torture or to extrajudicial killing, while the ATCA contains broader provisions permitting individuals to recover for torts committed abroad in some circumstances. Id.

While the statutory texts are silent as to heads-of-state, Plaintiffs' argument is explicitly negated by the TVPA's legislative history, which places it beyond debate that that statute had no effect on the head-of-state and diplomatic immunity doctrines. The leading Senate report on the TVPA stated: "The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction of U.S. courts over foreign diplomats . . . . Nor should visiting heads of state be subject to suits under the TVPA." S. Rep. No. 249, 102nd Cong,, 1st Sess. 7-8 (1991). Similarly, the House report stated that "nothing in the TVPA overrides the doctrines of diplomatic and head-of-state immunity . . . . These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business." H.R. Rep. No. 367, 102nd Cong., 1st Sess., Pt. 1 (1991), 1992 U.S.C.C.A.N. 84, 88.[6]

[6] This legislative history also negates plaintiffs' theory that head-of-state immunity was subsumed by the FSIA. When considering the TVPA in 1991, Congress recognized and preserved the continuing vitality of the doctrine and preserved the continuing vitality of that doctrine when it adopted the TVPA fifteen years after the FSIA's adoption.

The case law is to the same effect. Specifically, the Aristide court explicitly considered and rejected a claim, identical to Plaintiffs', that an extrajudicial killing was ordered by a head-of-state. The Aristide court reviewed the legislative history described above, and concluded that it need not consider whether the defendant's actions were official or private "because he now enjoys head-of-state immunity. The courts are barred from exercising personal jurisdiction over him." 844 F. Supp. at 139. Further, the court concluded that based on the clear legislative history, that the TVPA does not "trump" head-of-state immunity. Rather, it held, the Executive's Suggestion of Immunity is controlling in head-of-state cases; whether defendant's alleged acts were private was "irrelevant" in the context of head-of-state immunity; and, while the court had subject-matter jurisdiction under the TVPA, it could not "exercise in personam jurisdiction over defendant because of his head-of-state immunity." Id. at 140.

In sum, because defendants' head-of-state and diplomatic immunity deprive this Court of personal jurisdiction, see Point I.A., supra, the TVPA and ATCA do not provide Plaintiffs an avenue for relief.

3. The Susceptibility to Suit of Sitting U.S. Presidents Is Irrelevant

Plaintiffs assert that their case is analogous to several cases, particularly Clinton v. Jones, 520 U.S. 681 (1997), which concern the susceptibility to suit of United States officials while in office. Pl. Mem. 29-31. However, the principles that underlie the head-of-state immunity doctrine -- that comity and the conduct of foreign relations dictate that one nation's courts not assume jurisdiction over another nation's leaders, see supra Point I.A.1. -- are simply not implicated in such cases. In short, head-of-state immunity protects one nation's leaders from the exercise of jurisdiction by another nation's courts. The extent to which leaders enjoy

immunity from their own courts is a question for domestic law, not international law under the head-of-state immunity doctrine. Thus, the susceptibility to suit of former President Clinton or President Mugabe in their respective nations' courts does not raise the foreign affairs concerns central to the head-of-state immunity doctrine.

It is, however, useful to consider the kind of case involving the U.S. President where head-of-state immunity would be of paramount concern. One can easily imagine a litigant in a foreign state seeking to sue a sitting U.S. president for some perceived unjust policy or act. Head-of-state immunity recognizes that each nation's responses to foreign leaders' actions must rest in the conduct of foreign affairs, not the assertion of jurisdiction by domestic courts. Recognition of this important policy has led our courts, from The Schooner Exchange, through Peru and Hoffman, to Aristide, Alicog and First American Corp., to defer conclusively in such matters to the Executive Branch as both institutionally structured and Constitutionally empowered to conduct the nation's foreign affairs.

4. Developments Involving International Criminal Tribunals Have No Bearing on Civil Suits within the United States

Plaintiffs also invoke article 27 of the Rome Statute establishing the International Criminal Court ("ICC"), which subjects sitting heads-of-state to the jurisdiction of that tribunal, as an indication that head-of-state immunity no longer exists under customary international law. Pl. Mem. at 32. Plaintiffs also point to U.S. support for prosecution of President Milosevic before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), including when he was a sitting head-of-state. Id.

Contrary to Plaintiffs' assertion, the ICC and ICTY initiatives are irrelevant to head-of-state immunity as that doctrine applies in civil cases such as this in national courts.

Foremost, within the United States, courts are bound to accept a determination by the Executive Branch to suggest the immunity of a foreign head-of-state, and these international developments do not affect that rule. In any event, the jurisdiction of the tribunals referred to by Plaintiffs is limited to criminal jurisdiction which necessarily involves prosecution by governmental or governmentally-appointed authorities, and which presents issues entirely distinct from those created by private civil claims such as Plaintiffs' here. Further, neither body referred to is a national court – the ICTY was established pursuant to a U.N. Security Council Resolution under Chapter VII of the U.N. Charter and the ICC is to be formed under the Rome Statute, an international agreement not yet in force and to which the United States is not a party. Therefore, their creation does not address the issue of national court jurisdiction.[7]

Finally, tribunals such as the ICTY derive their authority from the U.N. Charter, which empowers the Security Council to make binding determinations on member states where necessary to restore international peace and security, notwithstanding prior international law to the contrary. U.N. Charter, Art. 103. And the ICC statute, which will not have such international authority, acknowledges the prevailing principles of customary international law on

[7] Foreign courts that have recently considered the matter, including in cases in Germany, France and the United Kingdom, have not found developments relating to the jurisdiction of international tribunals significant to the question of the immunity of a sitting head-of-state from criminal prosecution before domestic courts. See Re Honecker, 80 Int'l L. Rep. 365 (1984) (see App. Auth.); Re Qadhafi, Cour de Cassation (Supreme Court of Appeal, Criminal Div. (France), U.S. Dep't of State Language Services Translation, at 2 (Mar. 13, 2001) (see App. Auth.); see also Ex parte Pinochet, [2000] 1 A.C. 147 (see App. Auth.). The United States notes there is no need to consider application of the head-of-state immunity doctrine in the criminal context in this civil action.

head-of-state immunity.[8]

5. The "Act of State" Doctrine Does Not Apply Here

Resorting to cases involving the act of state doctrine, plaintiffs rely on language, drawn in particular from the Supreme Court opinion in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), in which several Justices indicated reluctance to accept State Department "Bernstein letters" as conclusive with respect to the exercise of the Court's jurisdiction.[9] However, the act of state doctrine is inapposite. In contrast to head-of-state immunity, which concerns the existence or non-existence of personal jurisdiction over a foreign head-of-state whose very recognition is constitutionally reserved for the Executive Branch, and which represents an obligation under customary international law, the act of state doctrine is a judicially-created principle designed to avoid entangling the courts in the conduct of foreign affairs in cases in which courts have subject matter jurisdiction and personal jurisdiction over the parties. See First National City, 406 U.S. at 763 ("act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are

---

[8] See Article 27(2) of the Statute ("Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."); see also Article 98 of the Statute ("The Court may not proceed with a request for surrender or assistance which would require a requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person").

[9] In act of state cases, the State Department may provide a so-called "Bernstein letter" advising the court that adjudication will not interfere with the conduct of foreign affairs. See Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2d Cir. 1954). In First National, three majority justices considered the Bernstein letter sufficient to allow adjudication, the four dissenting justices rejected the Bernstein letter and would have weighed additional factors, while the two remaining majority justices (who held in favor of the exercise of jurisdiction) would have considered other factors in addition to the "Bernstein letter."

met, will decide cases before it"); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 418 (1964) (act of state doctrine "does not deprive the courts of jurisdiction once acquired over the case") (quoting Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918)). The Supreme Court has explained the doctrine's theoretical underpinnings:

> We once viewed the doctrine as an expression of international law, resting upon "the highest considerations of international comity and expediency," Oetjen v. Central Leather Co., 246 U.S. 297, 303-304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 404 (1990). The act of state doctrine does not address the court's jurisdiction; rather, it concerns the question of when courts should defer to the political branches of government and, potentially, decline to exercise their existing jurisdiction. See First City National, 406 U.S. at 763 and 765 (doctrine affects cases "where appropriate jurisdictional standards are met"; doctrine originates in "the notion of comity" and is "buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent" to treaties).

Also unlike head-of-state immunity, the "act of state doctrine is . . . compelled by neither international law nor the Constitution, [and] its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." Sabbatino, 376 U.S. at 427-28. In contrast, head-of-state immunity deprives the Court of jurisdiction over the person of the head-of-state in question, and it implicates bedrock principles of international law. See Point I.A.1.,

supra.

Further, and importantly, many act of state cases, including First National City, involved the question of the extent to which a court should defer to an Executive Branch statement that the court's exercise of jurisdiction would not unduly interfere with foreign affairs. See First National City, 406 U.S. at 764 (State Department informed Court it believed doctrine "should not be applied to bar consideration" of counterclaim at issue). Thus, the six Justices who considered the Executive statement not dispositive were considering refraining from exercising their existing jurisdiction even though the Executive Branch had expressly stated that they could do so consistent with United States foreign relations interests. This hesitance on the part of courts to become involved in political questions or questions that could interfere with the conduct of foreign affairs is the exact opposite of what would be the effect of Plaintiffs' argument here, which would be for the Court to take action even where the Executive Branch has determined that the conduct of foreign affairs would be harmed by the Court's exercise of jurisdiction.

In sum, given the different concerns the act of state doctrine was designed to meet, and given the diminished or nonexistent risk of violating international law in applying the doctrine as compared to head-of-state immunity cases, the act of state doctrine cannot be construed to support the abandonment of well-established Executive authority over head-of-state immunity.

POINT II

THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS CONFERS DIPLOMATIC IMMUNITY ON DEFENDANTS MUGABE AND MUDENGE

Contrary to Plaintiffs' contention, see Pl. Mem. 33-37, the claims against defendants Mugabe and Mudenge should also be dismissed on the independent ground that each enjoys diplomatic, as well as head-of-state, immunity. Because defendants Mugabe and Mudenge were served while in New York as representatives of their nation to a United Nations proceeding, see Suggestion of Immunity ¶ 7, Ex. 1, the potential assertion of this Court's jurisdiction raises serious concerns for the United Nations, for each of its member states, and for the United States as host to the U.N.'s world headquarters. It is no exaggeration to say that Plaintiffs' suit threatens the ability of the U.N. to carry out its functions effectively; were foreign leaders potentially subject to civil suit by aggrieved parties whenever they set foot in New York, they would face a powerful disincentive to attend to U.N. business at that body's headquarters.

A. Plaintiffs' Reading of the U.N. General Convention Is Incorrect

In recognition of, and to protect against, exactly the type of threat posed by this suit to the U.N.'s functioning, the United Nations Charter provides:

> 1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
>
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
>
> 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of the Article or may propose conventions to the Members of the United Nations for this purpose.

United Nations Charter, Article 105. To give effect to Article 105, and pursuant to Article 105, paragraph 3, the U.N. General Assembly adopted the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1419, 59 Stat. 1031 (entered into force April 29, 1970) ("U.N. Convention"). The U.N. Convention is a multilateral agreement to which some 140 States, including the United States, are party, and which imposes binding international legal obligations on all such States. See El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 167 (1997) ("a treaty ratified by the United States is . . . the law of this land").

Plaintiffs contend that, particularly because section 11(a) of the U.N. General Convention grants one relatively narrow species of immunity to U.N. representatives, the broader provision of section 11(g) does not protect defendants Mugabe and Mudenge against this suit. See Pl. Mem. 33-37. This reading, however, would fail to give effect to the broad grant of immunity contained in subsection 11(g). In the view of the United States, it is fully compatible with the immunities granted under subsection 11(a) to also grant the immunities provided under subsection 11(g), so long as these additional immunities are not expressly excluded by section 11.

Even assuming arguendo that the text of section 11 could be interpreted as Plaintiffs urge, their reading is definitively negated by the history of the Convention's adoption by the United States. The report accompanying the Senate's advice and consent to ratification of the Convention makes clear that the United States intended by adopting the treaty to extend diplomatic level immunity to temporary representatives of Member States. See Report of the Committee on Foreign Relations, Exec. Rept. 91-17, 91st Cong. 2d Sess. (March 17, 1970). At hearings before the Foreign Relations Committee on March 9, 1970, State Department Legal

Adviser John R. Stevenson described the effect the Convention would have on privileges and immunities for nonresident representatives:

> At the present time resident representatives are already granted full diplomatic privileges and immunities under the headquarters agreement. Nonresident representatives, on the other hand, are only covered by the International Organizations Immunities Act and that grants them immunities relating to acts performed by them in their official capacity.
>
> Under the convention, the nonresident representatives would also receive full diplomatic privileges and immunities.
>
> The Chairman [Senator Fulbright]: They are the principal beneficiaries; is that right?
>
> Mr. Stevenson: They are in terms of numbers the principal beneficiaries. There are about 1,000 of them who would be covered who are not now.
>
> As Ambassador Yost [then the U.S. Permanent Representative to the U.N.] pointed out, many of the nonresident representatives are distinguished parliamentarians who come to New York for very short periods of time and we believe should be treated with the same respect as permanent representatives.

Exec. Rept. 91-17, 11-12.

In addition to this unambiguous indication that the Executive Branch viewed the Convention as creating broad immunities for temporary representatives to the U.N., the Senate Committee itself could not have been more clear on its understanding of the effect of ratification:

> With regard to representatives of members, currently only resident representatives of permanent missions to the U.N. have full diplomatic immunities. Nonresident representatives enjoy only functional immunities; that is, immunities with respect to their official acts. Under the convention, these nonresident representatives will also be entitled to full diplomatic immunities. The group covered here consists of foreign officials coming to the United Nations for a short time to attend specific meetings -- such as the annual fall meetings of the General Assembly. Foreign ministers and other high government officials, distinguished parliamentarians, and representatives of that caliber, fall into this category, which is estimated to number about 1,000 persons a year.

Id. at 3 (emphasis added). Defendants Mugabe and Mudenge are exactly the types of officials

contemplated by this language as being afforded "full diplomatic immunities" under the Convention, and, at the time they were served, they were engaged in exactly the type of visit "for a short time to attend specific meetings" at the U.N. that the United States intended to render absolutely immunized. Indeed, Ambassador Yost had highlighted this very concern for the Committee:

> I have long feared that a visiting dignitary to the United Nations might some day be involved in difficulties not of his own making and that the U.S. Government would be powerless to accord him the privileges which would be appropriate and which would be expected of us. Our ratification is long overdue.

Id. at 11. This Senate history leaves no doubt that both the Executive and Legislative branches understood and intended that section 11 extends diplomatic immunity to temporary representatives to the U.N., such as the individual defendants in this case.[10]

Were the United States to depart from this view, it might be the only State among 140 signatories to the Convention to deny such protection to temporary representatives. The U.N. and Member State representatives function on a global basis, and it is important that the Convention receive a common interpretation in all states where it applies. This is an important reason for the courts to defer to the interpretation of the U.N. Convention adopted by the United Nations and the United States. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185 (1982) ("[w]hen the parties to a treaty both agree to the meaning of a treaty provision, and that interpretation follows from the clear treaty language[, the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation"); accord, Kolovrat v. Oregon, 366 U.S.

---

[10] Moreover, the United Nations agrees, as reflected in a 1976 statement of its Legal Counsel that, "taken as a whole, Section 11 of the Convention in fact confers, except for the exemptions [expressly excluded], diplomatic privileges and immunities on the representatives of Members." 1976 U.N. Juridical Yearbook 227 (see App. Auth.).

187, 194 (1961) (courts give "great weight" to Executive Branch interpretation of treaty); 767 Third Avenue Associates v. Permanent Mission of Zaire, 988 F.2d 295, 301-02 (2d Cir. 1993) ("federal courts must defer" to treaty interpretation advanced by United States and not contradicted by any signatory to treaty).

Finally, the cases and others sources cited by Plaintiffs as supporting a more limited form of immunity under the Convention are inapposite because they involve U.N. officials (i.e., staff of the U.N. Secretariat), not representatives of Member States. In U.S. v. Enger, 472 F.Supp. 490 (D.N.J. 1978), defendants were both employees of the U.N. Secretariat, see 472 F. Supp. at 496 (defendants were "attached to the [U.N.] Secretariat"); similarly, in the passage cited from Jencks, International Law at 114, the author is treating the immunities of officials of international organizations. Apart from the Secretary-General and other senior officials covered by section 19 of the Convention, U.N. officials are accorded privileges and immunities under section 18, not section 11. Section 18 contains no provision comparable to subsection 11(g), and U.N. officials enjoy substantially different immunities than Member State representatives. Thus, these cases are irrelevant here.

POINT III

BOTH HEAD-OF-STATE AND DIPLOMATIC IMMUNITY RENDER DEFENDANTS MUGABE AND MUDENGE INVIOLABLE, SUCH THAT SERVICE ON THEM WAS A NULLITY AND SHOULD BE QUASHED

A. Diplomats and Heads-of-State Enjoy Personal Inviolability

The immunity of the person of the diplomat, i.e., his or her personal inviolability, is considered the core diplomatic immunity. As a leading treatise recognizes:

> Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognised. . . . The

> inviolability of ambassadors is clearly established in the earliest European writings on diplomatic law and from the sixteenth century until the present one can find virtually no instances where a breach of a diplomat's inviolability was authorised or condoned by the Government which received him.

Satow's Dipl. Practice 120; see also Sen, A Diplomat's Handbook of International Law and Practice 107 (3d ed. 1988) (it is "essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without any hindrance from the government of the receiving state, its officials and even private persons").

In 1978, Congress enacted the Diplomatic Relations Act, 22 U.S.C. § 254a et seq., to implement the Vienna Convention on Diplomatic Relations as the sole law on the subject in the United States. The Vienna Convention, Article 29, provides full personal diplomatic inviolability, stating simply that "[t]he person of a diplomatic agent shall be inviolable." Under head-of-state immunity in the circumstances of this case, a foreign head-of-state also enjoys full personal inviolability. See Restatement (Third) of Foreign Relations Law, § 464, Reporters' Note 14 ("When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as . . . an accredited diplomat").

B. Officials with Personal Inviolability Are Immune from Service of Process

All available authority known to the Government indicates that persons who are "inviolable" may not be served with process, subject to exceptions not applicable here. The service of process is an assertion of jurisdiction and is thus precluded as to persons, such as heads-of-state and diplomatic agents, who enjoy immunity from the court's jurisdiction. See Aidi v. Yaron, 672 F. Supp. 516, 517 (D.D.C. 1987) (diplomat enjoying immunity from suit was entitled not only to dismissal of complaint, but also to have service of process quashed; "[i]t is axiomatic that if jurisdiction is not available, then service of process is void, making a motion to

quash service of process a valid remedy"); Aristide, 844 F. Supp. at 130 (upon finding defendant enjoyed head-of-state immunity from action, a judgment "quashing service of process . . . and dismissing the action was promptly entered"); Vulcan Iron Works v. Polish Am. Machinery Corp., 472 F. Supp. 77, 78 (S.D.N.Y.1979) (Vienna Convention and Diplomatic Relations Act provide protection from "the jurisdiction and compulsory process of this court"); cf. 767 Third Avenue Assocs., 988 F.2d at 298 (treaty provision that diplomatic mission premises are "inviolable," Vienna Convention Art. 22, § 2, was "advisedly categorical and strong," and precluded eviction of Zaire's U.N. mission notwithstanding its substantial default on lease).

Moreover, in civil cases falling outside three narrow exceptions within Article 31(1) of the Vienna Convention (concerning real property claims, private estate matters and professional or commercial activities in the receiving State), or unless immunity is waived, the State Department considers that personal inviolability under Article 29 of the Convention precludes the service of compulsory legal process on diplomatic agents. As the Supreme Court has recognized, "the meaning given [treaty provisions] by the departments of government particularly charged with their negotiation and enforcement is given great weight." Kolovrat, 366 U.S. at 194.

Thus, because they are "inviolable" both under the head-of-state immunity doctrine and as representatives of a U.N. Member State entitled to diplomatic immunity, Defendants Mugabe and Mudenge were immune both from suit and from the service of process. Accordingly, the legal effect of the immunities enjoyed by defendants Mugabe and Mudenge should be not only the dismissal of claims against them, but an order either quashing the service of process upon them, or declaring that service of process to be a nullity.

CONCLUSION

For the reasons stated above and in the Government's Suggestion of Immunity, the complaint should be dismissed.

Dated: New York, New York
June 1, 2001

Respectfully submitted,

MARY JO WHITE
United States Attorney
Attorney for the
United States of America

By: _____
DAVID S. JONES (DJ-5276)
Assistant United States Attorney
100 Church Street, 19th Floor
New York, New York 10007
Telephone: (212) 637-2739

Of Counsel:

Stephen D. McCreary
Attorney-Adviser
Office of Diplomatic Law and Litigation
Office of the Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Attorneys for the United States
Department of State